



STATE OF NEW JERSEY

Board of Public Utilities

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TELECOMMUNICATIONS

IN THE MATTER OF THE JOINT PETITION)
OF SBC COMMUNICATIONS INC. AND AT&T)
CORP., TOGETHER WITH ITS CERTIFICATED)
SUBSIDIARIES FOR APPROVAL OF MERGER

ORDER

DOCKET NO. TM05020168

(SERVICE LIST ATTACHED)

BY THE BOARD

This Order memorializes the action taken by the Board of Public Utilities ("Board") at its August 17, 2005 Meeting, at which the Board voted to grant the petition of joint petitioners SBC Communications, Inc. ("SBC") and AT&T Corp. ("AT&T") (jointly "petitioners") for approval of a merger between the two companies and to formally adopt the provisional rulings made by the Board's Presiding Commissioner in this matter. As a threshold matter, we **HEREBY ADOPT** all provisional rulings of the Presiding Commissioner in this matter.

BACKGROUND AND PROCEDURAL HISTORY

SBC is a Delaware corporation with headquarters in San Antonio, Texas. It provides voice, data and Internet services to residential, business and government customers, mostly in a 13-state region. According to petitioners, SBC operating subsidiaries serve approximately 52.4 million access lines and 5.1 digital subscriber lines. SBC also holds a 60 percent economic and 50 percent voting interest in Cingular Wireless, which serves 49.1 million wireless customers.¹

AT&T is a New York Corporation with headquarters in Bedminster, New Jersey. AT&T subsidiaries are authorized to provide domestic and international telecommunications services to customers throughout the United States, and AT&T operates the world's largest and oldest communications network, spanning more than 50 countries. It provides an extensive array of data and Internet protocol ("IP") based services. AT&T has three subsidiaries in New Jersey which have been authorized by the Board to provide certain telecommunication services. AT&T Communications of NJ, L.P. is a limited partnership headquartered in Bedminster, New Jersey that is indirectly wholly-owned by AT&T. It is authorized by this Board to provide facilities-based and resold local exchange services and interexchange services throughout New Jersey. Teleport Communications New York is a division of Teleport Communications Group, Inc., which in turn is a wholly-owned subsidiary of AT&T. It is Board-authorized to provide facilities-based and resold local exchange service and intrastate, interLATA private line service in New

Jersey. TCG Delaware Valley, Inc. is a Delaware Corporation headquartered in Bedminster, New Jersey and indirectly wholly-owned by Teleport Communications Group, Inc. It is authorized by the Board to provide local exchange services in New Jersey.²

Petitioners state that the merger will not impede the Board's ability to regulate and effectively audit the intrastate portions of SBC Telecom, Inc., SBC Long Distance, the New Jersey certificated subsidiaries of AT&T, or any other entities certificated by this Board that are under the direct or indirect control of AT&T. All of those entities will continue to hold the state certificates they currently hold.³

According to petitioners, they entered into an Agreement and Plan of Merger on January 30, 2005. The Agreement provides for AT&T to be merged into a wholly owned subsidiary of SBC. Petitioners state that the SBC subsidiary will be a newly formed entity, created for the purpose of consummating the merger, and that AT&T will be the surviving entity of the merger with the newly formed entity for all legal purposes. It will retain the AT&T name and will be a wholly owned subsidiary of SBC.⁴

On February 28, 2005, SBC and AT&T filed a Joint Petition with the Board for approval of a merger of the two companies, pursuant to N.J.S.A. 48:2-51.1 and N.J.S.A. 48:3-10. A prehearing conference was held on April 14, 2005 and a Prehearing Order was subsequently issued on April 20, 2005. The Board stated in its Prehearing Order, *inter alia*, that it would consider the impact of the merger on competition, the rates of ratepayers affected by the acquisition of control, the employees of the affected public utility or utilities, and the provision of safe and adequate utility service at just and reasonable rates.

Covad Communications Company ("Covad") and Qwest Communications Corporation ("Qwest") filed motions for intervention pursuant to N.J.A.C. 1:1-16.1 on April 29, 2005 and May 4, 2005 respectively. On May 6, 2005, Covad withdrew its motion for intervention, and on May 24, 2005, Qwest converted its motion for intervention as a full party to a request for participant status pursuant to N.J.A.C. 1:1-16.6(c). Commissioner Frederick F. Butler, the Presiding Commissioner in this proceeding, granted Qwest participant status by Order dated May 25, 2005.

Petitioners and the Division of the Ratepayer Advocate ("RPA") filed pre-filed testimony on May 4, 2005 and rebuttal testimony on June 1, 2005. On June 6, 2005, the RPA filed a Motion to Compel Discovery and a Motion for Extension of Schedule. Petitioners filed their opposition to this motion on June 8, 2005. By Provisional Order dated June 9, 2005, Commissioner Butler denied the RPA's Motion to Compel and Motion to Extend the Schedule.

Petitioners filed an Emergent Motion for Protective Order on June 6, 2005 to protect from public disclosure information that petitioners maintained was highly confidential. The RPA opposed the motion on procedural grounds but did not contest the substance of petitioners' argument. Petitioners' motion was granted by Provisional Order dated June 29, 2005. Public hearings took place during the evening of June 6 in Somerville, New Jersey and June 9 in Gibbstown, New Jersey.

² Ibid.

³ Petition at 7

⁴ Ibid.

Evidentiary hearings commenced on June 14, 2005 and concluded on June 15, 2005.⁵ At the close of hearings on June 15, 2005, the RPA sought to move into evidence ten binders containing numerous SBC and AT&T documents, as well as the complete responses supplied by petitioners to discovery propounded by the RPA and Board Staff. Petitioners objected to the introduction of the binders and discovery into evidence. After hearing oral argument, Commissioner Butler instructed petitioners to submit written objections to the RPA exhibits. On June 21, 2005, petitioners filed their Opposition to Admission of Certain Documents Into Evidentiary Record ("Petitioners' Opposition") in which they opposed the admission of several documents contained in the binders, but also agreed to stipulate to the admission of certain other documents into the record. The RPA filed a reply to the Petitioners' Opposition on June 24, 2005, agreeing to withdraw its request to enter all the documents into evidence in exchange for the admission of select documents. On June 29, 2005, Board Staff also filed a reply to Petitioners' Opposition requesting that the documents requested by the RPA in addition to select responses to discovery requests of Board Staff and the RPA be entered into the record. Petitioners filed a reply to Board Staff's letter on June 30, 2005. Commissioner Butler released a Provisional Order on June 30, 2005, admitting into evidence eight additional documents requested by the RPA.

Petitioners and the RPA filed initial briefs on July 8, 2005, followed by reply briefs on July 22, 2005. On August 12, 2005, petitioners sought the admission into the record of a letter from SBC to Acting Governor Richard J. Codey. The RPA responded to this request by letter dated August 15, 2005, in which it reiterated portions of its substantive argument against the merger, but did not object to the admission of the letter. On August 16, 2005, Commissioner Butler issued a Provisional Order admitting the aforementioned letter into evidence. At the Board's regularly scheduled agenda meeting on August 17, 2005, the Board voted to approve the merger and grant petitioners' February 28, 2005 Joint Petition.

STATUTORY CRITERIA

N.J.S.A. 48:2-13 provides the Board with jurisdiction and control over public utilities, defined to include "every copartnership, association, corporation or joint stock company...that now or hereafter may own, operate, manage or control within this State any...telephone or telegraph system, plant or equipment for public use, under privileges granted or hereafter to be granted by this State or any political subdivision thereof."

Pursuant to N.J.S.A. 48:3-10, "[n]o public utility incorporated under the laws of this State shall sell, nor shall any such public utility make or permit to be made upon its books any transfer of any share or shares of its capital stock, to any other public utility, unless authorized to do so by the board. Nor shall any public utility incorporated under the laws of this State sell any share or shares of its capital stock or make or permit any transfer thereof to be made upon its books, to any corporation, domestic or foreign, or any person, the result of which sale or transfer in itself or connection with other previous sales or transfers shall be to vest in such corporation or person a majority in interest of the outstanding capital stock of such public utility corporation unless authorized to do so by the board. Every assignment, transfer, contract or agreement for assignment or transfer, by or through any person or corporation to any corporation or person in violation of any of the provisions hereof shall be void and have no effect..."

⁵ 1T = Transcript of BPU hearing in the instant matter, Day One, June 14, 2005.

2T = Transcript of BPU hearing in the instant matter, Day Two, June 15, 2005.

N.J.S.A. 48:2-51.1 provides, in pertinent part "[n]o person shall acquire or seek to acquire control of a public utility directly or indirectly through the medium of an affiliated or parent corporation or organization, or through the purchase of shares, the election of a board of directors, the acquisition of proxies to vote for the election of directors, or through any other manner, without requesting and receiving the written approval of the Board of Public Utilities. Any agreement reached, or any other action taken in violation of this act shall be void. In considering a request for approval of an acquisition of control, the board shall evaluate the impact of the acquisition on competition, on the rates of the ratepayers affected by the acquisition of control, on the employees of the affected public utility or utilities, and on the provision of safe and adequate utility service at just and reasonable rates."

As more fully discussed below, petitioners maintain that the proposed merger satisfies the statutory criteria in New Jersey, is overwhelmingly in the public interest and the Board should promptly and unconditionally approve the transaction.⁶ The RPA argues that petitioners have failed to demonstrate that the proposed merger will have positive benefits, and further argues that adverse impacts under each statutory criterion will occur as a result of the merger. The RPA further states that the proposed merger will eliminate competition in the mass market; significantly increase the prices that existing and prospective customers pay for telecommunications services, eliminate jobs for AT&T New Jersey employees, and lead to decreased service quality for New Jersey consumers, all of which the RPA contends warrant denial of the proposed merger as proposed.⁷

STANDARD OF REVIEW

SBC/AT&T

Petitioners take the position that the applicable standard of review in this merger review is a so-called "no harm" standard, involving a determination of whether the merger would adversely affect any of the four statutory criteria in question.⁸ Petitioners further argue that a correct analysis would take into account the effect of the merger on all the relevant factors taken as a whole.⁹ In support of its position, petitioners cite several recent Board decisions in which a "no harm" standard was allegedly employed.¹⁰ Petitioners distinguished the Board's adoption of a more stringent "positive benefits" test in two recent energy mergers, involving NUI Utilities, Inc. and PSE&G, by arguing that the Board expressly reserved this standard for transactions involving potential ramifications of exceptional magnitude. Petitioners contend that the instant proceeding does not involve such a transaction.¹¹

⁶ Pet. Initial Brief at 1

⁷ RPA Initial Brief at 1

⁸ Pet. Reply Br. at 3-5

⁹ Ibid.

¹⁰ See Re WorldCom, Inc., No. TM97120882, 1998 WL 252656, (N.J.B.P.U. Apr. 29, 1998); Re Qwest Communications Corp., No. TM99090680, 2000 WL 1055418 (N.J.B.P.U. June 28, 2000); Order, Joint Application for Approval of a Transfer of Control of IXC Communications Servs. Inc. and Subsidiaries to Cincinnati Bell, Inc., No. TM99080528, 1999 WL 1082632 N.J.B.P.U. Nov. 4, 1999); Order, Joint Petition of AT&T Corp. and Teleport Communications Group Inc. for Declaratory Ruling that the Board Lacks Jurisdiction Over the Agreement and Plan of Merger, or, In the Alternative, for Approval of the Agreement and Plan of Merger, BPU Docket No. 98020050 (N.J.B.P.U. May 15, 1998); Re Bell Atlantic Corp. No. TM98101125, 2000 WL 504583 (N.J.B.P.U. Mar. 15, 2000).

¹¹ Pet. Reply Brief. at 3-4

RPA

The RPA argues that the Board is required to employ a higher standard of proof than that espoused by petitioners, one that requires petitioners to show that "positive benefits" to ratepayers will result from the merger.¹² The RPA opines that petitioners must demonstrate such benefits and also show, at a minimum, that little or no adverse impact to the four criteria used by the Board to evaluate the merger will result therefrom.¹³ The RPA cites the Board's decision in the aforementioned PSE&G merger proceeding in support of its argument that a higher test is applicable.¹⁴ The RPA also notes that the Board has indicated that it will undertake a rulemaking concerning standards of review in future merger proceedings, but that no such rules currently exist.¹⁵

DISCUSSION

Neither of the statutes under which the Board exercises review of this merger, N.J.S.A. 48:2-51.1 and N.J.S.A. 48:3-10, specifies the standard of review the Board should use in evaluating a share transfer or determining a merger's impact on the four enumerated criteria referenced above. Nor is there any other statutory requirement under New Jersey law that the Board use a particular standard of review in such proceedings.

In its past reviews of proposed mergers, the Board evaluated the individual circumstances of each case in order to determine which standard of review ("no harm" or "positive benefits") to employ, and considered such circumstances as the disparate regulatory frameworks governing different industries and companies (e.g. their level of rate deregulation), as well as the magnitude of the proposed transaction and its potential effect on ratepayers.¹⁶ Even in cases in which the Board has utilized a "no harm" standard, it has considered the appropriate treatment of an acquisition's claimed benefits, including, but not limited to, merger savings, and has examined the degree to which ratepayers shared in those benefits.¹⁷

A similar determination must be made in the instant case. AT&T is headquartered in this State and has a long history of employing a significant number of New Jersey citizens, as well as providing a wide variety of services to a large customer base in New Jersey. New Jersey's interest in this merger, therefore, goes well beyond that of a typical state. On the other hand, AT&T, as a CLEC, is not a regulated monopoly, and the Board has not exercised jurisdiction over most of its rates, permitting them instead to be set by the competitive market. Balancing

¹² RPA Reply Brief at 2

¹³ Ibid.

¹⁴ See Transcript of BPU Agenda Meeting, June 22, 2005, Item 2B, In the Matter of the Joint Petition of Public Service Electric and Gas Company and Exelon Corporation for Approval of a Change in Control of Public Service Electric and Gas Company, and Related Authorizations, Docket No. EM05020106.

¹⁵ RPA Reply Brief at 2, n.1

¹⁶ See, e.g., Order, I/M/O the Petition of NUI Utilities, Inc. (d/b/a Elizabethtown Gas Company) and AGL Resources Inc. for Authority under N.J.S.A. 48:2-51.1 and N.J.S.A. 48:3-10 for a Change in Ownership and Control, Docket No. GM04070721 (November 17, 2004) at 5-6; Order, I/M/O Petition of Atlantic City Electric Company and Conectiv Inc. for Approval of a Change in Ownership and Control, BPU Docket No. EM97020103 (Jan. 7, 1998) ("Conectiv") at 5-6; Order, I/M/O Consideration of the Joint Petition of Orange and Rockland Utilities, Inc. for Approval of the Agreement and Plan of Merger and Transfer of Control, Docket No. EM98070433 (April 1, 1999) ("RECO") at 5.

¹⁷ See e.g., Conectiv at 6-8; See also, N.J.A.C. 14:1-5.14(a)(10) (requiring petitions for approval of a merger or consolidation of a New Jersey utility with that of another public utility to contain information regarding "[t]he various benefits to the public ... which will be realized as the result of the merger.")

these considerations, we find that in order for this Board to be justified in approving petitioners' proposed merger, petitioners must demonstrate not merely that the merger does no harm to any of the four enumerated criteria, but that on aggregate, the merger would affirmatively promote the public interest. Said another way, petitioners in this case must show, at a minimum, that some positive benefit would result from the merger with respect to at least one of the four criteria, and that no harm would result with respect to the other three.¹⁸

With this standard in mind we now turn to the facts and opinions in evidence in this case to determine whether petitioners have made a sufficient showing with respect to the statutory four criteria to permit this Board to approve the proposed merger.

1. Merger's Impact on Competition

SBC/AT&T

Petitioners state that the merger will not negatively impact the state of competition in New Jersey, primarily because SBC has no significant presence in the State.¹⁹ Petitioners allege that SBC attempted to enter New Jersey in the late 1990's following its merger with Ameritech, and that that effort was not successful.²⁰ Petitioners contend that SBC's purchase of AT&T's assets will not cause those assets to be removed from the competitive marketplace. Rather, petitioners assert that the same assets will continue to be used to provide telecommunications services in the State after the merger. Thus, according to petitioners, no net loss of competitive presence in the State will result from the combination of the two companies.²¹

SBC stated that the combined company will market Voice-over-Internet Protocol ("VoIP") services to mass market customers in New Jersey following consummation of the proposed merger, rather than traditional wireline services.²² According to SBC, the deployment of fiber optic networks in New Jersey would have virtually no chance of earning its cost of capital, and the combined company will not, therefore, pursue this strategy.²³ However, SBC also contends that competition will not be harmed by its intended deployment of VoIP to provide telecommunications services to the mass market. SBC points out that AT&T has already made an irreversible pre-merger decision to discontinue actively marketing local and long-distance service to residential and small business customers in New Jersey and elsewhere, using wireline or VoIP services.²⁴ AT&T has reportedly already dismantled infrastructure required to recruit new mass market customers by dismissing marketing personnel, terminating vendor contracts, and closing outbound telemarketing centers.²⁵ In short, AT&T has stopped pursuing mass market customers in New Jersey.²⁶ Petitioners contend that absent the merger, neither SBC nor AT&T would meaningfully participate in the mass market in New Jersey, using any

¹⁸ The Board has recently publicly stated its intention to initiate a rulemaking to clarify the standard of review in merger reviews.

¹⁹ Pet. Initial Brief at 7

²⁰ Ibid.

²¹ Id. at 8-9; 2T80-5 to 2T81-21

²² 1T79-16 to 1T80-24

²³ 1T85-7 to 1T86-10

²⁴ P-6 at 11

²⁵ Id. at 9-10

²⁶ Pet. Initial Brief at 10

technology.²⁷ Thus, they maintain that the combined company's reliance on VoIP as its mass-market vehicle will not reduce the level of mass market competition in the State.²⁸

Petitioners further assert that their plans to roll out VoIP represent an undeniable benefit to competition and consumers, even if that specific product offering is not immediately available to every customer in the State of New Jersey.²⁹ More generally, petitioners contend that competition will be furthered by the entrance into the market of a financially strong and stable competitor, which AT&T currently is not. According to petitioners, the combined entity will be able to fulfill this role in the New Jersey marketplace more effectively than AT&T can now or in the foreseeable future. The new company would benefit from increased funding for research and development and capital expenditures, and will reverse AT&T's current trend of cutting back in these areas. More funding would also be available to the combined entity for aggressive marketing to enterprise customers and (using VoIP) to the residential market in New Jersey.³⁰

Petitioners state in their brief that they are unwilling to commit to any conditions proposed by the RPA with respect to competition. According to petitioners, such conditions are legally unnecessary, since petitioners have demonstrated that competition in the State will not be harmed by the merger, and will in fact be improved by SBC's entrance into the market.³¹ Moreover, petitioners argue that the conditions proposed by the RPA were arrived at arbitrarily, and would unfairly impede the combined entity's ability to operate in the fast moving, highly competitive telecommunications market that now exists in New Jersey and nationwide.³²

RPA

The RPA argues that the merger as it is presently structured will drastically reduce competition for residential and small business consumers in New Jersey.³³ According to the RPA, this is because the merger will allegedly eliminate a significant competitor to Verizon New Jersey, Inc., New Jersey's largest incumbent local exchange carrier ("ILEC").³⁴ Because SBC's inducement to merge with AT&T was the acquisition of a company with unparalleled success in the enterprise market, the merged company has, according to the RPA, little or no interest in mass market consumers.³⁵ This alleged lack of interest is, according to the RPA, evidenced by SBC's refusal to contemplate a "fiber-to-the-curb" strategy for entering New Jersey's mass market with a traditional "plain old telephone service" ("POTS") offering.³⁶

The harm to competition allegedly caused by the merger is, in the RPA's opinion, exacerbated by the generally poor state of wireline competition in New Jersey at the present time.³⁷ Moreover, the RPA disputes petitioners' assertion that the provision of mass market VoIP services would significantly ameliorate the harm to competition caused by the merger, since a broadband connection is a prerequisite for such service, and not all customers in New Jersey

²⁷ Id. at 11

²⁸ Ibid.

²⁹ Ibid.

³⁰ Id. at 9-10

³¹ Id. at 25

³² Id. at 25-27

³³ RPA Initial Brief at 1

³⁴ Id. at 13

³⁵ See id. at 9-10

³⁶ Ibid.

³⁷ RPA-1 at 40

are willing or able to obtain such a connection.³⁸ Nor, according to the RPA, are wireless or cable services economic substitutes for POTS that would allow AT&T's existing mass market customers to migrate to another company other than the new combined entity.³⁹ The RPA believes that SBC's unwillingness to enter and actively compete in the wireless mass market in New Jersey constitutes harm to the state of telecommunications competition in the State.⁴⁰

The RPA further disputes that AT&T's self-described "irrevocable" withdrawal from the active marketing of local exchange mass market services is significant in terms of evaluating the effect of the merger on competition, since AT&T is still, according to the RPA, a profitable business with millions of customers nationwide.⁴¹ It dismisses the purported advantage to residential consumers from the merger cited by petitioners, that SBC will aggressively market VoIP to the New Jersey mass market, and that in its equally aggressive push to acquire enterprise customers SBC will "trickle down" some of AT&T's innovations to residential and small business customers.⁴² The RPA concludes that if this merger is approved, competitive markets in New Jersey will receive no benefit and residential and small business customers will be harmed.⁴³

Based on the foregoing, the RPA recommends that as a condition of approval of the merger, the Board should require SBC to make infrastructure and broadband commitments to benefit residential and small business consumers in New Jersey by spending \$750 million over a three-year period.⁴⁴ Specifically, the RPA maintains that SBC should commit to compete with Verizon in local mass markets in New Jersey and offer digital subscriber line ("DSL") service at basic voice grade service rates to mass market consumers in New Jersey "smart growth" areas in order to make its VoIP service more financially feasible for POTS customers.⁴⁵ If SBC is unwilling to commit to compete in New Jersey's mass market, the RPA recommends that the Board direct SBC to divest its residential and small business customers, presumably to other competitive local exchange carriers in New Jersey, so that local competition can occur.⁴⁶

The RPA also contends that intrastate access charges in New Jersey are priced substantially in excess of their cost, which inhibits the development of competition. The RPA recommends that the Board commit to a comprehensive investigation of intrastate access charges within, at most, a nine-month period.⁴⁷

DISCUSSION

After a thorough review of the positions of the parties and the evidentiary record, the Board concludes that the proposed merger will not result in harm to telecommunications competition in New Jersey. In fact, the Board finds a likelihood that the merger will improve competition in certain market segments, thereby creating a positive benefit for ratepayers. Therefore, the Board rejects the RPA's position that it is necessary to place conditions on petitioners in order to ensure that the merger does not harm the level of competition in the State's telecommunications market.

³⁸ Id. at 43-45

³⁹ Ibid.

⁴⁰ RPA Reply Brief at 4-5

⁴¹ RPA Initial Brief at 11

⁴² Id. at 1-2

⁴³ Id. at 9-10

⁴⁴ Id. at 2

⁴⁵ Ibid.

⁴⁶ Id. at 14

⁴⁷ Id. at 15

The Board's conclusions are based on two inescapable facts: SBC has no meaningful presence in New Jersey, and AT&T has ceased attempting to compete with other CLECs in New Jersey for mass market customers. Both facts are firmly established in the record.⁴⁸ No party has contested that SBC's presence in New Jersey, in terms of customers served, is *de minimus*. Nor is there compelling evidence in the record suggesting that SBC intends to enter any segment of the New Jersey wireline market absent the merger. In fact, the opposite appears to be true.⁴⁹

However, the RPA appears to contest petitioners' assertion that AT&T no longer competes or will compete in the mass market, by pointing out that AT&T is still a viable company with millions of customers. To this end, the RPA points out that AT&T still offers wireline calling plans to residential customers on its website.⁵⁰ The Board, however, does not doubt the compelling evidence that AT&T has effectively removed itself from the telecommunications mass market in New Jersey. This decision was made largely in response to two factors: the rapid rise in wireless usage and the discontinuance by the Federal Communications Commission of the unbundled network element platform ("UNE-P") as an entrance vehicle for local service.⁵¹ In 2004 the company stated that it would stop marketing to traditional local and long distance residential customers and selectively raise prices for those customers. It also announced its intention to stop or reduce marketing to small business customers and end efforts to "win back" such customers who had been lost to competitors.⁵² The announcement has been followed by layoffs and equipment retirements in the areas related to these services.⁵³ We believe that this abdication is significant and long lasting, even if AT&T still ostensibly offers residential service packages.⁵⁴ AT&T has experienced declines in revenue in recent years, especially with respect to consumer services, and can expect to continue experiencing such declines in the future.⁵⁵ Its capital expenditures have also declined over the same period.⁵⁶ Without actively marketing its services or attempting to remain competitive in terms of price, at a minimum a steady loss of mass market share can be expected.⁵⁷ Certainly AT&T has expressed its belief that it can and will no longer compete effectively in this market.⁵⁸

Even the RPA's witness concedes that successful entrance into ILEC-dominated markets requires a CLEC to overcome significant barriers.⁵⁹ She also notes that, in the wake of the

⁴⁸ P-5 at 7, 10-11, 30; P-6 at 9-10

⁴⁹ P-1 at 17-18; 2T82-84

⁵⁰ RPA Reply Brief at 9

⁵¹ P-6 at 3-4

⁵² P-5 at 7

⁵³ Ibid.; P-6 at 9

⁵⁴ The RPA's citation (for the first time, in its reply brief) of what it claims to be residential calling plans currently available from AT&T does not demonstrate that "AT&T is still able to compete in the residential...local service market." (RPA Reply Brief at 9). The Board cannot reach this conclusion without knowing, at a minimum, what AT&T's competitors are offering, and what AT&T's costs are in connection with these services, information that has not been put in the record of this proceeding. The Board finds the fact that AT&T is not actively marketing these packages, and has reduced the assets and headcount needed to do so, to be more telling than the fact that they are ostensibly still available to residential consumers.

⁵⁵ P-5 at 4-5

⁵⁶ Id. at 6

⁵⁷ 2T142-1 to 13

⁵⁸ P-6 at 9-10

⁵⁹ RPA-1 at 19

FCC's Triennial Review Remand Order⁶⁰, "end-user lines provided by CLECs through unbundled network elements...are already declining."⁶¹ In fact, the record shows that AT&T has refrained, due to revenue pressures, from aggressively marketing not only its mass market wireline services, but also its VoIP product, CallVantage.⁶² AT&T witness Morrissey testified that no State or federal regulatory change at this stage, including the resetting of access rates, was likely to entice AT&T back into the residential wireline market.⁶³ Thus, the record does not support the RPA's apparent position that AT&T would become a viable mass market competitor absent the merger.

Given these circumstances, it is difficult to see how the proposed merger would diminish competition in New Jersey, since the net effect of SBC's purchase of AT&T's assets would not be the removal of an active competitor from the market (either SBC or AT&T). In fact, the record indicates that, at worst, the same assets would continue to be used by the new combined entity to provide the same services to existing AT&T customers.⁶⁴ SBC has stated that it will continue to serve AT&T's existing wireline mass market customers, but has not made any commitment to market wireline services to new mass market customers. However, this distinction simply reflects the current state of affairs under AT&T rather than a harm caused by the merger.

SBC has also stated its intention to market VoIP services to New Jersey mass market customers. The RPA rightly points out that VoIP is not an economic substitute for POTS, since it requires a broadband connection, for which some consumers are unwilling or unable to pay. However, the RPA's argument ignores that fact that absent the merger, New Jersey residential consumers will not likely benefit from *either* AT&T's wireline POTS or its VoIP product, since AT&T by itself apparently has no ability or intention to aggressively reenter this market using either vehicle. Because of this, the merger will likely create a positive benefit for the residential customer: a more willing, capable and financially stable VoIP provider in the New Jersey mass market than exists today.

Similarly, enterprise customers in New Jersey may be expected to realize another affirmative benefit from the merger: the addition of a financially healthy, well funded competitor to the enterprise market. The record indicates that AT&T's ability to develop and bring to market new telecommunications products and services has been limited, and will continue to be limited, by lack of funding for research and development and capital expenditures.⁶⁵ This problem has also led to precipitous job losses for the New Jersey company.⁶⁶ SBC's purchase of AT&T should, to some extent, alleviate this difficulty over the long term, and lead to the faster introduction of new telecommunication services for New Jersey's medium and large-sized businesses. At the very least, nothing in the record indicates that SBC's merger with AT&T will further exacerbate AT&T's already dire financial situation, which has affected its ability to compete in both the mass and enterprise markets.

⁶⁰ I/M/O Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand, FCC Docket No. 04-290 (February 4, 2005)

⁶¹ RPA-1 at 20-3 to 5

⁶² P-6 at 10

⁶³ 2T206-18 to 2T212-18

⁶⁴ P-5 at 31

⁶⁵ P-6 at 3-4

⁶⁶ Id. at 15

Based on the foregoing, the Board sees no basis to impose conditions on the merger, as proposed by the RPA. The only justification for such conditions ~~would be~~ to rectify some deficiency in petitioners' evidentiary showing (as measured by the relevant standard of proof) with respect to the impact of the merger. Thus, if the proposed merger caused some harm to the competitive environment in New Jersey, some action by petitioners ~~which~~ would alleviate or reduce that harm might be required, and would, under those circumstances be well within the Board's power to impose as a condition to approving the merger. Moreover, if a proposed merger offered no positive benefit whatsoever in any relevant category, conditional approval might be necessary to ensure that some public benefit arose from the Board's allowing the merger to take place. Such is not the case here. As stated above, the record shows that, given AT&T's current financial plight, its merger with SBC will not harm any segment of the competitive market in New Jersey, and will, at a minimum, likely help both the enterprise and mass markets, though in different ways. Therefore, no conditions are necessary with respect to the Board's review of the first statutory factor under N.J.S.A. 48:2-51.1.

Furthermore, even if competitive conditions were required, we find that those proposed by the RPA to be unworkable. Nowhere does the RPA produce any analysis supporting its contention that the Board should order SBC to spend \$750 million over three years on infrastructure and broadband facilities to benefit residential and small business consumers in New Jersey. Nor is there any evidentiary support for this figure elsewhere in the record. Similarly, we see no basis in the record for ordering the new company to provide "naked" DSL service to mass market customers in New Jersey as a merger condition. AT&T itself does not currently offer this service, so whatever inequities to residential customers are allegedly caused by its absence are not a result of this proposed merger. This being the case, we do not believe that on this record, the imposition of a DSL requirement on the new company is required or appropriate.

More generally, it is difficult to discern why, when there will likely be benefits to competition arising from the merger, the Board should force SBC to invest in the wireline mass market when it has not forced AT&T to make a similar investment absent the merger. In fact, the RPA's proposed conditions appear to have nothing to do with the merger, but are designed to bring about a competitive environment that is significantly more active than the one that would exist if petitioners had never agreed to merge. While this is a laudatory goal, it far exceeds what is appropriate or justified in this proceeding, given that merger-related benefits have been demonstrated by petitioners, and that the new company will operate in a largely deregulated telecommunications market.

Similarly, there is no evidentiary support for the RPA's notion that forcing AT&T to divest its mass market customers would invigorate mass market wireline competition in New Jersey. The RPA assumes without elaboration that there would be a ready market among CLECs for such customers. The RPA does not explain why the same regulatory and competitive hurdles which have dissuaded AT&T from continuing to seek out new residential customers (primarily the rise of wireless and the loss of UNE-P) would not similarly impede other (smaller) CLECs from profitably serving these customers. In short, given the sufficiency of petitioners' evidentiary showings, such a condition is not justifiable on this record.

Finally, the Board disagrees that intrastate access charges are sufficiently related to this proceeding to be considered herein. We note that the ongoing FCC intercarrier compensation rulemaking, in which the Board has filed comments, will likely have a direct impact on intrastate

access charges, and the Board will continue to monitor that proposed rulemaking.⁶⁷ While the Board may take further action in this area given a demonstrated need for doing so, we believe that addressing it here would unnecessarily confuse the record and expand this proceeding beyond its intended parameters. Because it is unnecessary to consider access charges to fulfill our statutory duty under N.J.S.A. 48:2-51.1, we decline to do so here.

2. Merger's Impact on the Rates of Ratepayers Affected by the Acquisition of Control

SBC/AT&T

Petitioners assert that the merger will not cause an increase in the rates paid by ratepayers in New Jersey. Because the merger has no horizontal effects, according to petitioners, it is not expected to create a diminution of competitive pressure that would result in higher prices for any services.⁶⁸ The merger will occur at the holding company level, and will, according to petitioners, be transparent and virtually seamless to New Jersey consumers. Accordingly, petitioners assert that both SBC's and AT&T's operating subsidiaries in New Jersey will continue to exist in their current form upon consummation of the merger, and the merger will have no adverse effect on the terms or conditions of service – including rates – provided by any of those entities to their current customers.⁶⁹

Petitioners also maintain that, insofar as the combined company is able to achieve efficiencies and develop innovations that neither company could achieve standing alone, ratepayers can expect to receive better value for their telecommunications dollar than they are receiving today.⁷⁰ Petitioners expect this to occur as a result of the marriage between AT&T's highly advanced R&D capabilities and global network with SBC's own network and financial strength.⁷¹ Petitioners opine that this is why no existing or potential customer in New Jersey raised any objection to the merger in the public hearings sponsored by the Board.⁷²

Petitioners further submit that the combined company will be forced to compete aggressively on the merits in New Jersey. They argue that, in this environment, the ordinary workings of the marketplace will occur, thus refuting the suggestion that the merger itself could cause an increase in rates.⁷³ The combined company will, according to petitioners, operate in a highly competitive environment in which customers have choices.⁷⁴ The company will therefore have no additional market power over price in comparison to AT&T's.⁷⁵ Petitioners further argue that as a combined company they would lack any incentive to raise prices for AT&T's existing residential customers, since they intend this market segment to serve as the base for the combined company's VoIP and wireless marketing efforts.⁷⁶ According to petitioners, the fact that AT&T raised prices for existing wireline residential customers prior to the merger is completely unrelated to the merger itself. Rather, they state that it has to do with the fact that

⁶⁷ See I/M/O Developing a Unified Inter-carrier Compensation Regime, CC Docket 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685 (March 24, 2005).

⁶⁸ P-5 at 26

⁶⁹ Pet. Initial Brief at 12

⁷⁰ Id. at 13

⁷¹ Id. at 21-22

⁷² Id. at 13

⁷³ Ibid.

⁷⁴ Id. at 14

⁷⁵ Id. at 15; P-5 at 22

⁷⁶ P-5 at 22

AT&T has decided, irrespective of the merger, to cease attempting to compete for residential customers on the basis of price.⁷⁷

Petitioners also deny that the evidence cited by the RPA in support of its contention that post-merger prices in New Jersey will rise, consisting of 1) a citation to the testimony of Dr. Carlton and Dr. Sider concerning an SBC document and 2) RPA-19, a synergy model purporting to calculate merger cost savings and efficiencies, support this contention. Petitioners note that neither Dr. Carlton nor Dr. Sider was familiar with the first document when it was presented to them during cross-examination.⁷⁸ They further contend that the second document, RPA-19, does not state that prices in New Jersey will rise.⁷⁹ Moreover, petitioners contend that, even if SBC intends to raise prices in a post-merger environment in New Jersey, the State's competitive telecommunications climate will not permit such unilateral action.⁸⁰

RPA

The RPA submits that if the proposed merger is approved, SBC and AT&T will significantly increase the prices that existing and prospective consumers pay for telecommunications services.⁸¹ The RPA states that, although the merger stands to generate \$15 billion in synergies for the combined company, petitioners refuse to make any commitments that will protect ratepayers and employment in New Jersey.⁸² According to the RPA, the record in this case has shown that AT&T has already increased local exchange rates for its residential and small business customers.⁸³ The RPA further points out that SBC, as of July 1, 2005, increased prices for vertical features offered to its in-region mass market customers who purchased features outside of a bundled offering. In the RPA's view, the demonstrated proclivity of both SBC and AT&T to raise rates for mass market customers means that the Board should impose conditions on the combined entity to ensure that such increases cannot occur in this State.⁸⁴ The RPA therefore recommends that the Board require SBC to commit to a multi-year rate freeze, and possibly a rollback to pre-July 2004 prices for AT&T's residential and small business customers, so that AT&T consumers benefit from the multi-billion dollar transaction.⁸⁵ The RPA contends that headcount reductions contemplated both prior and after the merger are reducing SBC's operating expenses significantly and therefore increasing its margins and revenues, so that the company can afford to commit to lower rates in New Jersey.⁸⁶

The RPA also claims that the petitioners have not provided evidence regarding the combined entity's cost of serving AT&T's local exchange customers in New Jersey although they indicate that they anticipate being able to leverage their access to these customers in order to provide other services.⁸⁷ The RPA also reiterates its concerns regarding concentration in the market for landline circuit-switched voice services for mass market customers.⁸⁸ The RPA believes that

⁷⁷ Pet. Initial Brief at 13-14

⁷⁸ Pet. Reply Brief at 11

⁷⁹ Ibid.

⁸⁰ Id. at 11-12

⁸¹ RPA Initial Brief at 1

⁸² Ibid.

⁸³ Id. at 3

⁸⁴ Ibid.

⁸⁵ Id. at 3, 15

⁸⁶ Id. at 12

⁸⁷ Id. at 15

⁸⁸ RPA Reply Brief at 10

such a development would permit the combined entity to raise rates for those customers.⁸⁹ The RPA states that petitioners have submitted no data or analysis indicating why this outcome is unlikely.⁹⁰ Citing a document not admitted into the record, the RPA alleges that SBC recently reneged on a promise to the Ohio Public Utilities Commission to not raise rates for certain retail services.⁹¹

The RPA also contends that SBC should be ordered to commit to a smooth transition for those AT&T customers who are now served by UNE-P and whom SBC does not choose to continue serving after the FCC-imposed cutoff in March 2006.⁹²

DISCUSSION

Based on a thorough analysis of the positions of the parties and evidence in the record, the Board concludes that this proposed merger will have little, if any, adverse influence on rates. This determination is closely related to and largely based on the Board's finding that the merger will not significantly reduce the current level of competition in New Jersey's telecommunications market. Because of this fact, there appears to be little risk that the merger will cause rates for AT&T's customers to rise faster or to a greater extent than they would absent the merger.⁹³

In support of this conclusion, the Board notes that AT&T has already increased its rates for its mass market wireline voice services, and that it took this action before it sought to merge with SBC.⁹⁴ Rather than reflecting a general "proclivity" to raise rates, as the RPA suggests, this action appears to demonstrate AT&T's avowed unwillingness to compete for local and long distance mass market customers with other carriers.⁹⁵ We therefore see AT&T's action, which preceded the execution of the Merger Agreement with SBC, as unrelated to the subject of this proceeding, but illustrative of the likely effect on rates of forcing AT&T to continue as a stand alone company in New Jersey.

The Board also notes the testimony of SBC witnesses Carlton and Sider, indicating that the combined entity will not have the economic incentive to raise rates any faster than AT&T would have absent the merger.⁹⁶ With respect to enterprise customers, the combined entity will operate in, and be disciplined by, a market containing significant competition.⁹⁷ Moreover, it appears that SBC's desire to retain AT&T's existing customers, in order to market its wireless and VoIP services more effectively, will produce an economic incentive to not raise rates for those customers.⁹⁸ At the very least, logic would dictate that this incentive would be stronger for the combined entity than for AT&T alone, which has no wireless assets, cannot afford to aggressively market its VoIP product, and has stated its clear intention to exit the wireline mass market by refusing to seek new customers or to match any downward competitive pressure on rates.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Id. at 11

⁹² RPA Initial Brief at 3

⁹³ 2T118-2 to 2T119-21; 2T120-12 to 2T121-18

⁹⁴ RPA-2 at 11-12

⁹⁵ P-6 at 9; P-5 at 25

⁹⁶ P-5 at 25

⁹⁷ P-5 at 28

⁹⁸ P-5 at 25

The RPA's basic argument regarding the merger's effect on rates is that reduced competition will invariably allow the combined entity the exercise of market power over mass market customers in New Jersey. However, as stated above, the evidence does not suggest, and the Board does not agree, that the present state of mass market competition will be negatively impacted by the merger. The evidence in fact suggests that, given AT&T's marked reluctance and inability to continue in the mass market arena, competition in that segment will likely be furthered by the entrance of the merged company rather than impeded. Therefore, the Board does not believe that a rate freeze or rollback is necessary to ameliorate any impact on rate levels caused by the merger. Absent this imperative, we see no justification for imposing rate caps on a company that will operate in a competitive environment, in which technological advances that cannot be predicted over a long time-frame are the norm.

Moreover, the RPA recommends a rate freeze or rate rollback to July 2004 levels. However, the record does not demonstrate why these particular levels would appropriately rectify whatever harm to rates would result from the merger being approved. Nor is it clear how long this freeze, if imposed, should be in place. We note that, to the extent the rates charged by AT&T in mid-2004 were based on its ability to deliver service using UNE-P, they were based on a mode of delivery which will be discontinued, pursuant to federal law, in the near future, making them inapt as a benchmark going forward.⁹⁹

In its Initial Brief the RPA references a document, Exhibit RPA-19, in support of its contention that the combined entity will raise rates. However, we do not agree that RPA-19 clearly indicates that rates will rise in the long term in New Jersey after the merger. Rather, RPA-19 appears to be a general projection of merger synergies, and does not clearly establish that the merger will result in rates being raised in an anti-competitive manner in New Jersey.¹⁰⁰ The RPA cites the cross-examination of Drs. Carlton and Sider, in which a second document, Binder 4, Bates No. 124790-124801, was discussed as probative of SBC's general financial health. However, the full meaning of this document was never established at hearing, although it clearly pertains to SBC's in-region area, and was produced over one year ago.¹⁰¹ Accordingly, we give it no weight in this proceeding.

The Board also declines to assign significant weight to a document cited by the RPA for the first time in its reply brief which is not in the record, C-3 (attached to the RPA's Reply Brief). The document purports to be a news article issued by "TMCnet" discussing price increases by SBC in Ohio in March 2004. No foundation for its admission was presented at the hearing. Nor did the Presiding Officer take judicial notice thereof. Irrespective of its admissibility, petitioners have had no opportunity to rebut the contents of the document or otherwise test its reliability. Given the type of information purported to be contained in the article, and the fact that it has not been placed in the record we think it fundamentally unfair that the document should be considered in the Board's deliberations without any meaningful opportunity for petitioners to challenge its contents.

Based on all the evidence in the record, we conclude that petitioners have demonstrated that no harm to rate levels is likely to result from the merger. Given AT&T's competitive posture and financial condition, we believe that any mass market rate increases that may occur after this merger is effectuated would have been just as likely to occur without the merger. Therefore, pursuant to our statutory mandate under N.J.S.A. 48:2-51.1, we do not find a likelihood of

⁹⁹ Pet. Initial Brief at 25

¹⁰⁰ RPA-19

¹⁰¹ 2T102-9 to 2T110-3.

increased rates resulting from this transaction. We therefore decline to impose any rate freeze or rollback as a condition to approval of the merger.

3. Merger's Impact on the Employees of the Affected Public Utility or Utilities

SBC/AT&T

Petitioners state as a threshold matter that AT&T's employees in New Jersey work for AT&T Corp., not for the "affected public utility or public utilities" – *i.e.*, AT&T's New Jersey subsidiaries (AT&T Communications of NJ, L.P., Teleport Communications New York, and TCG Delaware Valley, Inc.).¹⁰² Petitioners therefore claim that by definition, the merger can have no adverse effect on the "employees of the affected...public utilities."¹⁰³ However, petitioners also acknowledge that this Board is interested in the impact of the merger on all AT&T employees in the State, irrespective of which AT&T entity or subsidiary actually employs them.¹⁰⁴

Petitioners state that the merger will not itself diminish AT&T's prospects as a long-term, stable employer in the State.¹⁰⁵ On the contrary, petitioners argue that the very point of the transaction is to create a viable, financially robust, efficient, and stable competitor that will expand upon AT&T's tradition of outstanding service in New Jersey and elsewhere.¹⁰⁶ A more efficient and stable competitor, according to petitioners, will be a more efficient and stable employer.¹⁰⁷ Petitioners point to AT&T's significant job losses in New Jersey over the past three to five years and note that this trend is expected to continue in 2005 absent the merger, pursuant to a strategic plan announced prior to execution of the Merger Agreement.¹⁰⁸ This plan incorporates AT&T's cost cutting initiatives and diminishing presence in the New Jersey mass market.¹⁰⁹

Petitioners do not anticipate that the merger will yield significant job losses in New Jersey in the short term.¹¹⁰ Petitioners state that the bulk of the remaining AT&T jobs in New Jersey are in three organizations that are vital to the success of the combined company: AT&T's Network Operations Center ("NOC"), AT&T Labs, and Enterprise Operations.¹¹¹ They further state that significant headcount reductions in these organizations are unlikely. The NOC is, according to petitioners, essential to the smooth operation of AT&T's global network and would be very difficult to replicate elsewhere. AT&T Labs is referred to in petitioners' brief as a leader in the field and the "crown jewel" of the acquisition.¹¹² Similarly, AT&T's enterprise marketing operations are, according to petitioners, important to SBC because they are the source of AT&T's established relationships with large enterprise customers, and have a proven track record in attracting new customers, which is one of the primary motivations for SBC's acquisition of AT&T.¹¹³ Petitioners represent that the people employed in these three organizations are thus vital to the combined company's future.¹¹⁴

¹⁰² Pet. Initial Brief at 15

¹⁰³ Ibid.

¹⁰⁴ P-7 at 15

¹⁰⁵ Pet. Initial Brief at 16

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ P-7 at 15-16

¹⁰⁹ Ibid.

¹¹⁰ P-1 at 25

¹¹¹ Pet. Initial Brief at 17

¹¹² Id. at 18

¹¹³ Ibid.; P-1 at 25

¹¹⁴ Pet. Initial Brief at 18-19

In fact, SBC has expressly committed to maintaining these three crucial New Jersey-based assets in the State after the merger.¹¹⁵ SBC has stated that doing otherwise would make no economic sense for the combined company, and that it is far more likely that the new company will grow significant portions of these operations.¹¹⁶ Petitioners opine that the three assets are likely to grow in size after the merger because of expected increases in capital spending in research and development and enterprise marketing activity by the combined company.¹¹⁷

Despite this, petitioners acknowledge that the merger will result in the elimination of duplicative corporate overhead, some of which will be in New Jersey.¹¹⁸ Indeed, a large part of the synergies petitioners expect to realize from the merger will result from headcount reductions.¹¹⁹ However, according to petitioners, not all, or even most, of the layoffs will occur in New Jersey, since many of the remaining corporate employees in the State are affiliated with the aforementioned critical business organizations.¹²⁰ Petitioners also allege that SBC's past practice has been to eliminate headcount through voluntary retirement packages and natural attrition to the extent possible.¹²¹

Petitioners disagree with the RPA regarding the imposition of employment-related merger conditions. They contend that "the recommendation that the combined company commit to specific employment levels at AT&T Labs runs headlong into the undisputed fact that, absent the merger, AT&T's employment in New Jersey will continue to plummet, whereas in the wake of the merger the combined company expects employment to stabilize and, over time, increase."¹²² Petitioners also contend that a Board order requiring increased funding at AT&T Labs would not address any harm actually caused by the merger, which will, if anything, lead to an expansion of work opportunities in that organization.¹²³

Petitioners also believe that the imposition of any conditions on the combined company would harm New Jersey consumers by impeding the company's ability to compete effectively in the rapidly-changing telecommunications market.¹²⁴ They contend that this could impose unnecessary costs on firms by forcing them to operate inefficiently, leading to delays in the introduction of new products.¹²⁵ According to petitioners, if the new company is required to direct valuable resources to satisfy regulatory conditions rather than responding to market signals, it will be more difficult for the company to justify the costs of developing new services and technologies.¹²⁶

¹¹⁵ SBC Letter to Acting Gov. Codey, dated August 12, 2005 ("SBC Letter").

¹¹⁶ Ibid.

¹¹⁷ Pet. Initial Brief at 17-18

¹¹⁸ Id. at 19

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Pet. Reply Brief at 18

¹²³ Ibid.

¹²⁴ Id. at 19

¹²⁵ Ibid.

¹²⁶ Ibid.

RPA

The RPA contends that petitioners have failed to provide sufficient data to conclude that the merger will not harm employment levels in New Jersey.¹²⁷ The RPA cites various discovery responses in which petitioners allege that they are unable to provide specific headcount reduction data because such detailed planning cannot be conducted under current antitrust law until after the merger has closed.¹²⁸

The RPA submits that the proposed merger of SBC and AT&T would eliminate a substantial number of AT&T jobs in the State.¹²⁹ According to the RPA, this job loss may reduce revenue to the New Jersey economy by more than \$1 billion.¹³⁰ The RPA points out that 85 percent of the expected merger synergies will come from cost reductions, and 58 percent of those cost reductions will come from staff reductions alone.¹³¹ While these cost cutting measures will make the whole range of services offered by the merged company more profitable, there would be, according to the RPA, no corresponding benefit to ratepayers.¹³² Moreover, the RPA contends that the transaction will generate over \$9 billion in value for shareholders and result in substantial payments to senior executives from both companies, either as a bonus or through the exercise of golden parachutes.¹³³

The RPA believes that petitioners have failed to demonstrate in sufficient detail the merger's impact on employment levels in the State. In particular, the RPA criticizes petitioners' inability or unwillingness to state exactly where and in what number reductions will take place.¹³⁴ RPA witness Baldwin opines that AT&T's jobs are particularly vulnerable because AT&T is the acquired company, and given that SBC is headquartered in Texas, many of the cuts can be expected in New Jersey.¹³⁵

The RPA recommends that the Board minimize what it sees as the adverse impact of the merger on AT&T employees by requiring SBC to commit to retain the same level and mix of AT&T New Jersey employees as existed as of June 1, 2005 for three years after the merger occurs, and retain the same level of employees at AT&T Labs as existed as of June 1, 2005 for three years after the merger occurs.¹³⁶ The RPA also recommends that the Board order the new company to provide "out-placement" services for non-management employees whose jobs are eliminated as a result of the merger.¹³⁷

The RPA also submits that SBC should commit to increase funding by 20 percent for AT&T Labs for research and development efforts in each of the next three years (for a 60 percent increase in funding over three years). This 20 percent investment is in addition to the \$750 million infrastructure investment that the RPA previously recommended.¹³⁸ The RPA opines that this condition would further the employees' interests by signaling to them SBC's

¹²⁷ RPA Reply at 13-15

¹²⁸ Ibid.

¹²⁹ RPA Initial Brief at 3

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ RPA-1 at 59

¹³⁵ Id. at 61-62

¹³⁶ RPA Initial Brief at 3

¹³⁷ RPA-1 at 69

¹³⁸ RPA Initial Brief at 3-4

commitment to the success of the Labs, thereby preventing a “brain drain” from this valuable asset.¹³⁹ The RPA also opines that this funding commitment would help SBC to compete more effectively in New Jersey.¹⁴⁰

DISCUSSION

This Board is highly cognizant that under the standard of review set forth above, it must seek to ensure that AT&T's employees in New Jersey are protected, to the greatest degree possible, from negative effects of this proposed merger. However, we are also aware that AT&T's current employment situation can be fairly characterized as a downward spiral. AT&T's headcount reductions in New Jersey over the last five years have been precipitous, and this trend is projected to continue for the foreseeable future in the absence of SBC's intervention.¹⁴¹ In the last four years, AT&T has also lost more than half of its stand-alone residential long distance customers.¹⁴² Its market capitalization is less than a quarter of SBC's, less than half that of Sprint, and slightly smaller than Alltel's.¹⁴³ No party to this proceeding contests these disturbing facts.

In light of the foregoing, we would consider any development that would slow or arrest AT&T's job losses as an improvement over the current state of affairs regarding employment. Such a development could only be seen as an affirmative benefit to the overall employment landscape in the State. Even though SBC has not provided detailed headcount reduction data, the evidence demonstrates that SBC's acquisition of AT&T, combined with its commitment to keep three of AT&T's major New Jersey assets in this State, meets the affirmative benefit test. This is because the merger likely represents the best available opportunity for AT&T to arrest its current job slide and attain some level of employment stability and growth. This also appears to be the view of the two unions representing AT&T workers, the Communications Workers of America and the International Brotherhood of Electrical Workers, which have publicly supported the merger.¹⁴⁴

We acknowledge that some layoffs in New Jersey will occur as a result of the merger, largely from within the corporate management functions of AT&T¹⁴⁵ (although there appears to be no support in the record whatsoever for the RPA's assertion that these losses will reduce state revenues by more than \$1 billion). In fact, it is clear that over half of the expected synergies will arise from headcount reductions, although not all of these will necessarily occur in New Jersey. However, we note SBC's firm representation that it is committed to maintaining three significant AT&T assets in New Jersey which currently employ a large number of New Jersey workers. This representation is crucial to our analysis, as it provides some assurance that New Jersey will continue to be the locus of a significant number of AT&T jobs for the foreseeable future. Moreover, we do not believe that the future of AT&T's currently depleted workforce would be better served by preventing SBC, with its greater access to investment capital, from merging with AT&T. Rather, while we are aware that petitioners have not, and cannot, guarantee that the combined company will experience economic growth in New Jersey over the long term, the evidence clearly demonstrates that this outcome is more likely under a new regime than under

¹³⁹ Id. at 17

¹⁴⁰ Petition, Ex. C, D

¹⁴¹ 2T15-21 to 23; 1T129-3 to 23

¹⁴² P-6 at 7-8

¹⁴³ Id. at 9

¹⁴⁴ Pet. Initial Brief at 16-17

¹⁴⁵ Pet. Initial Brief at 19; P-1 at 25

AT&T as a stand-alone company. Such growth is the only surefire way to ensure sustainable improvement in AT&T's employment picture.

Given this reality, we reject the RPA's call for employment freezes to be imposed on the new company. While superficially ameliorative of AT&T's current employment trends, we believe that such measures could, under the circumstances, do more harm than good. As a threshold matter, we do not believe that, given the evidence in this case and petitioners' commitments regarding AT&T's New Jersey facilities, this record supports the imposition of employment level restrictions. Furthermore, it is clear from the record that AT&T's loss of market share and revenue, caused by its inability to compete effectively in the marketplace, have necessitated cost-cutting measures that are at the heart of the massive job losses plaguing the company.¹⁴⁶ The new company will be forced to compete against several long-established, well-entrenched telecommunications carriers in this State. None of these competitors (not even the State's largest ILEC) are required to comply with Board imposed employment levels. We therefore believe that burdening the new company with rigid employment commitments for an extended period, irrespective of the regulatory, macroeconomic or marketplace conditions it faces, would not be conducive to the type of economic growth that will ensure vibrant competition and, more importantly, long-term, sustainable employment in New Jersey's telecommunications sector. In short, we will not impose short-term employment measures at the expense of potential long-term job development.

Similarly, we reject the RPA's recommendation that the Board require the new company to increase its research and development ("R&D") funding for AT&T Labs by 60 percent over three years. The RPA does not provide analytical support for this number. Furthermore, the record already indicates the likelihood of increased R&D funding following the merger, at least in comparison to the amount currently undertaken by AT&T.¹⁴⁷ More importantly, given the evidentiary record in this case, we believe that the SBC is in a far better position than the RPA, or the Board, to determine appropriate funding levels for its own laboratories. We are greatly concerned about the recent decline in funding for AT&T Labs, and the effect this trend may have on New Jersey's telecommunications-related economy. However, this trend is unrelated to the merger, and reflects the atrophied state of AT&T's financial condition over a prolonged period.¹⁴⁸ The record in this matter indicates that the best route to renewed vigor would be to permit SBC to inject AT&T with new funding in a way that makes the most competitive sense, rather than through the imposition of a rigid investment quota. We therefore decline to impose such a condition.

Based on the foregoing, we find that the merger will not, in the long term, harm employment levels in New Jersey, and will likely improve them in comparison with their direction under AT&T. Moreover, petitioners have committed to maintaining AT&T's NOC, Labs and Enterprise Operations in this State. Because of this, we find that a discernable positive benefit to employment will result from the merger.

4. Merger's Impact on the Provision of Safe and Adequate Utility Service at Just and Reasonable Rates

SBC/AT&T

¹⁴⁶ RPA-7 at 3-4

¹⁴⁷ 1T91-2 to 16; P-3 at 9; P-4 at 5

¹⁴⁸ P-6 at 7-8

Petitioners state that integration of AT&T's national and global IP network with SBC's network will allow a more efficient and cost-effective distribution of network traffic, as well as the redeployment of redundant equipment and facilities which in turn will lead to higher quality service, increased security, and increased reliability of service.¹⁴⁹ Petitioners also assert that the merger will allow the combined company to increase the pace of innovation, roll-out new services more quickly, and offer those services to a broader range of customers.¹⁵⁰ Petitioners further contend that AT&T's focus today is on enterprise customers, while SBC's traditional focus has been on the mass market and small- and medium-sized businesses. Therefore, they assert that the combined company will have a broader and more varied base of customers, leading to the more efficient distribution of new technologies.¹⁵¹

Petitioners conclude that, because the incentive to invest is greatest when the resulting innovation can be offered across multiple services and the broadest range of customers, the combined company will have greater incentive to undertake such investments than will AT&T, with its shrinking customer base.¹⁵² Thus, according to petitioners, these economies of scale will ultimately improve service quality after the merger, since the combined company will be able to develop, deploy and market a wider range of advanced services to a broader customer base than is possible now.¹⁵³ Such services are expected to include enhanced Internet security measures and IP-based video services.¹⁵⁴

Petitioners dispute the RPA's contention that the service quality for AT&T's "legacy" customers could be jeopardized by the new company's attempts to achieve merger synergies. Petitioners claim that the new company's desire to maintain these customers as a potential market for VoIP and other non-wireline services provides a greater incentive to maintain high quality service than AT&T currently has.¹⁵⁵

RPA

As a threshold matter, the RPA notes that petitioners have invoked federal antitrust law containing what petitioners claim is a prohibition on their exchange of competitively sensitive information before the merger is consummated. This, according to petitioners, has prevented them from engaging in detailed planning regarding the post-merger composition and headcount levels of the new company. Accordingly, the RPA claims that it would be premature for the Board to approve the proposed transaction when there are no firm plans offered regarding service quality in New Jersey.¹⁵⁶ RPA therefore recommends that the Board postpone its decision on the proposed merger until after the FCC and Department of Justice have rendered their decisions and petitioners are able to provide firm plans as to the operations of the merged company.¹⁵⁷

The RPA further submits that the proposed merger, and the cost cutting measures that will accompany it, could lead to decreased service quality for New Jersey consumers.¹⁵⁸ The RPA

¹⁴⁹ Pet. Initial Brief at 21

¹⁵⁰ Ibid.

¹⁵¹ Id. at 21-22

¹⁵² Id. at 22

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ 1T80-1 to 6; P-2 at 17

¹⁵⁶ RPA Reply Brief at 21

¹⁵⁷ RPA Initial Brief at 9

¹⁵⁸ RPA Initial Brief at 1; RPA-1 at 69

points to alleged deficiencies in SBC's service in Michigan and Ohio as warnings to this Board that a decline in service quality can be expected in New Jersey following the merger.¹⁵⁹ The RPA also contends that AT&T's "legacy" POTS customers, at least those unwilling to transition to the new company's VoIP service, will inevitably suffer from a decline in service quality as the company attempts to cut costs.¹⁶⁰

The RPA recommends that the Board order the new company to implement a transition plan for AT&T's UNE-P mass market customers and a comprehensive customer education to assist consumers in understanding their options for bundled and unbundled telecommunications service offerings.¹⁶¹

DISCUSSION

A thorough review of the parties' positions and the evidence presented in this proceeding does not indicate that degradation of service quality will result from the proposed merger.¹⁶² We have been presented with no reason, beyond unsupported speculation, to dispute petitioners' assertion that the merger will facilitate the introduction of newer, more innovative services to a broader array of customers, at least compared with the *status quo*. The record indicates that the merger should have a positive affect on research and development, and that higher capital spending in R&D by the new company is more likely than by AT&T alone.¹⁶³ The enlarged scope of the new company should also increase the likelihood that the benefits of developing advanced technologies can be spread across a larger network and customer base.¹⁶⁴ No compelling evidence contradicts this assertion.

We also note the importance of SBC's commitment, stated in both written and oral testimony, to maintaining service to these legacy POTS customers.¹⁶⁵ While we acknowledge and applaud SBC's plans to aggressively market AT&T's CallVantage VoIP product for mass market use (something that AT&T itself has not been able to undertake), we note that many of these customers may not be willing or able to switch to Internet-based services in lieu of POTS. Therefore, while POTS service is presumably available from other carriers, it is important for the sake of maintaining service continuity that these customers not be deprived of the service they currently enjoy as a result of SBC's acquisition.

Given the foregoing, we see no reason to institute merger conditions to ensure the continuing provision of safe and adequate service. While we wish to ensure a smooth transition for any remaining customers being served by AT&T via UNE-P when that mode of service delivery is discontinued, we believe that this merger proceeding is not the appropriate forum for implementing any appropriate measures. Rather, such changes are more appropriately addressed in the Board's Triennial Review Order docket, via commercial agreements between

¹⁵⁹ RPA Reply Brief at 20

¹⁶⁰ RPA Initial Brief at 1; RPA-1 at 69

¹⁶¹ RPA-1 at 69-70

¹⁶² We note that none of the documents cited by the RPA for the first time in its reply brief have been entered into the record. Nor has judicial notice been sought. Petitioners have therefore had no meaningful opportunity to respond to, rebut, explain or comment on them. We believe that, given the nature of the information purporting to be contained in these documents (as paraphrased by the RPA), it would not comport with basic standards of fundamental fairness or due process to give any weight to them at this late stage of the proceeding.

¹⁶³ P-3 at 9; P-4 at 5, P-5 at 25

¹⁶⁴ P-3 at 10

¹⁶⁵ 1T80:1-6; Pet. Reply Brief at 16

AT&T and Verizon, or through amendments to Board-approved interconnection agreements. Consumer protection issues are also of concern to the Board, but we do not believe that there is sufficient evidence in the record to justify imposing, as an ameliorative merger condition, a Board-mandated education program. We therefore decline to do so here. Similarly, we see no compelling justification on this record for ordering SBC to offer benefits, such as out-placement services, to non-management employees. Absent such a showing, we decline to impose these measures as a condition of merger approval.

CONCLUSION

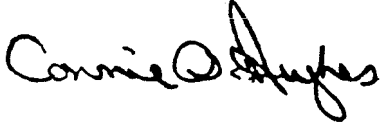
Based on all the evidence in the record, and weighing the likely results of the merger with the *status quo*, the Board believes that SBC's merger with AT&T should produce positive societal benefits, especially in the areas of competition and employment in this State. We also believe that the merger will not result in adverse impacts to any of the four categories under the Board's statutory review. We therefore **FIND** that the proposed merger is in the best interests of the people of this State, and that the petition of SBC and AT&T for Board approval of said merger and for permission to engage in any transactions necessary or appropriate to affect the Agreement and Plan of Merger should be and is **HEREBY GRANTED**. Petitioners shall inform the Board of the date on which the proposed transaction has been consummated. This Order shall not limit, diminish or otherwise affect the Board's existing authority and jurisdiction over any public utility in the State of New Jersey. We **HEREBY RESERVE** our right to revisit and reconsider our decision should any federal governmental entity deny petitioners' request for approval of this merger.


DATED: 10/4/05

BOARD OF PUBLIC UTILITIES
BY:


JEANNE M. FOX
PRESIDENT


FREDERICK F. BUTLER
COMMISSIONER

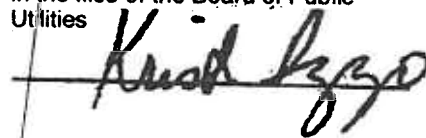

CONNIE O. HUGHES
COMMISSIONER


JACK ALTER
COMMISSIONER

ATTEST:


KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within
document is a true copy of the original
in the files of the Board of Public
Utilities



AT&T/SBC MERGER SERVICE LIST

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